SUPREME COURT, U. S.

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No. 867

In the Supreme Court of the United States

OCTOBER TERM, 1968.

ANTHONY J. SCHERER, JR.,

Petitioner,

vs.

KENNETH MORROW,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Anthony J. Scherer, Jr., Plaintiff-Appellant below, by his duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered September 25, 1968, (App. B).

In support of this petition your petitioner respectfully shows:

OPINIONS BELOW

The District Court filed a Memorandum of Opinion, which is appended to this petition.

The Opinion of the Court of Appeals, for the Seventh Circuit was filed September 25, 1968, and is reported in 401 F. 2d 204.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the Act of June 5, 1968, c. 646, 62 Stat. 928, Title 28 U.S.C. §1254.

QUESTION PRESENTED FOR REVIEW

Does the Doctrine of Official Immunity extend and protect from suit an agent of the United States Secret Service assigned to lecture trainees of the Police Department of the City of Chicago, upon the responsibilities and actions of the United States Secret Service in protecting the President of the United States, where, after completing that lecture he maliciously slanders petitioner, a private citizen?

STATEMENT OF THE CASE

Petitioner seeks a reversal of the judgment of the Court of Appeals for the Seventh Circuit, entered September 25, 1968, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered October 31, 1967, in favor of the respondent and against the petitioner, on the respondent's motion for summary judgment that the slanderous statements were protected by official immunity, under *Barr* v. *Matteo,* 360 U.S. 564.

The action was commenced by Petitioner's filing of his complaint at law with a demand for a jury on December 8, 1966, in the Circuit Court of Cook County, Illinois (App. 3-5).

The complaint seeks damages in the sum of One Hundred Thousand Dollars ($100,000.00) by reason of the false, defamatory and slanderous words spoken by the respondent against the petitioner.

Petitioner's complaint alleged that on or about December 10, 1965, at Chicago, Illinois, the respondent in the presence and hearing of approximately 30 persons, most of whom were trainees in the Department of Police of the City of Chicago maliciously spoke of and concerning the petitioner the following false and defamatory words to-wit:

> "That Scherer, he's a nut."

The respondent thereby meant and intended to mean and it was understood to persons hearing such statement that the petitioner was a mentally deranged person.

That at the same time and place and in the presence of the same persons he also spoke of and concerning the petitioner the following false and defamatory words to-wit:

> "We went to his house and deactivated the cannon that he had pointed, O'Hare Field, the day President Johnson came to Chicago."

Thereby the respondent meant and intended to mean and it was understood by persons hearing such statement as meaning that petitioner intended to make use of his discharge a cannon at President Lyndon B. Johnson for the purpose of assassinating him or inflicting severe bodily harm upon him. That the statements were wholly false. (App. 4-5)

Respondent filed a petition for removal which petition alleged among other things that the action arose out of incidents alleged to have occurred at a time when respondent was acting under the color of his office as an Agent

of the United States Secret Service. (App. 2-3) Respondent thereafter filed his answer and motion for summary judgment together with supporting affidavits. The answer contained an affirmative defense alleging that respondent at the time and place of the event complained of and while performing those acts complained of which are admitted herein, was in the scope of his official duties and under color of his office as a Special Agent of the United States Secret Service. (App. 6)

Respondent's affidavit admitted that on December 10, 1965, he lectured before a class of Cadet Police Officers of the Chicago Police Department at the Police Department Academy, Chicago, Illinois. That he was directed by the Asst. Special Agent in Charge of the United States Secret Service to so lecture.

That he would lecture to that group upon the responsibilities and actions taken pursuant thereto of the United States Secret Service including remarks on the functions and actions of protecting the President of the United States. That during a question and answer period following the lecture a question was asked by one of the cadet officers of petitioner, which he answered to the best of his ability. (A. 7)

The affidavit of Maurice G. Martineau states that on December 10, 1965, he was Asst. Special Agent in Charge of Chicago Office of United States Secret Service that in compliance with the instructions of the Director of the United States Secret Service he directed respondent to lecture before a class of cadet officers of the Chicago Police Department on the history, jurisdiction and functions and activities of the United States Secret Service. That the purpose of the lecture was to instruct the cadet officers to

make them knowledgeable of Secret Service responsibilities and enable them to cooperate with the Secret Service.

His affidavit also set forth the legislative authority for the United States Secret Service protection of the President and that pursuant to that authority the Office of the Director of the United States Secret Service was established by the Secretary of the Treasury. That the Director compiled United States Secret Service manual which provides in part:

> "It will always be paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation. They must have as much information as necessary in order to carry out their support function. Their instructions must be explicit so that they are clearly aware of all Secret Service requirements." (Section 911.1, paragraph 4) "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)" (Section 912.2, paragraph 3)
>
> "Each SAIC (Special Agent in Charge) is responsible for the establishment and development of effective puble relations within his district. The necessity for establishing personal contact with other law enforcement officials . . . is self-evident." (Section 912.1, paragraph 3)
>
> "Lectures on the history of the Secret Service, jurisdictional responsibilities and activities will be made by SAIC's and SA's (Special Agents) who are qualified speakers . . ." (Section 912.2, paragraph 1)

* * *

The purpose of the lecture was to:

> ". . . instruct the cadet officers so as to make them knowledgeable of all Secret Service responsibilities and to enable them to extend to the Secret Service the fullest cooperation and support in the discharge by the Secret Service of its statutory responsibilities."

Petitioner filed a counter-affidavit stating that the allegations of fact contained in the complaint are true and correct and that there were approximately 30 Police trainees at a training program at the Police Department Academy, Chicago, Illinois, and at that time and place the respondent said of the plaintiff the matters alleged in plaintiff's complaint. Petitioner's complaint stands undenied by any affidavit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, NAMELY: THE EXTENT OF THE AUTHORITY OF A SECRET SERVICE AGENT IN LECTURING TO A MUNICIPAL POLICE TRAINING GROUP OF THE FUNCTIONS AND ACTIONS OF THE SECRET SERVICE IN PROTECTING THE PRESIDENT OF THE UNITED STATES. DOES THAT AUTHORITY INCLUDE THE ABSOLUTE RIGHT TO MALICIOUSLY SLANDER A PRIVATE CITIZEN AFTER HE HAS COMPLETED HIS ASSIGNED LECTURE?

Petitioner is no stranger to this Court. He petitioned for certiorari in Case No. 719 in the October, 1967 term, in the case entitled *Scherer* v. *Brennan and Noack.* The petition was denied, Justice Douglas voting to grant the writ 389 U.S. 1021.

In the case at bar, the opinion states that Justice Schnackenberg, who participated in the hearing, oral arguments and the conference of the division judges, died prior to the adoption of the opinion. He was of the view that the judgment order of the district court should be reversed. The basis for the ruling below was that the action of the respondent in stating in a question and answer period following his assigned lecture,

"That Scherer he's a nut", that the secret service had deactivated the cannon that he [petitioner] had pointed

at O'Hare Field the day President Johnson came to Chicago, was absolutely privileged. It being within the "outer perimeter" of his line of duty, citing *Barr* v. *Matteo,* 360 U.S. 564, and the court's opinion in *Scherer* v. *Brennan,* 379 F. 2d 609, 611.

As stated in our petition in *Scherer* v. *Brennan and Noack* it has become standard practice of the United States whenever one of its employees or officials sued to have that person file an affidavit supported by the affidavit of a superior, that his actions which are the subject matter of the suit were done within the scope of his authority. That practice was followed in the case at bar. Respondent filed his affidavit stating that as Special Agent of the United States Secret Service, he was directed by his superior to lecture before a class of cadet police officers of the Chicago Police Department. That he has a standard lecture including remarks on the functions of the United States Secret Service in protecting the President of the United States. (App. 7). His superior's affidavit confirmed the assignment of the respondent to make the lecture at which the slanderous statements were made. That affidavit states that the purpose of the lecture was to instruct the cadet officers so as to make them knowledgable of all Secret Service responsibilities.

The slanderous statements alleged in petitioner's complaint occurred during a question and answer period following the lecture and were not within the "outer perimeter" of respondent's authority. He was specifically assigned to give a standard lecture on the functions of the United States Secret Service in protecting the President and to instruct the cadet officers to make them knowledgeable of Secret Service responsibilities. It was not part of that lecture to call plaintiff a "Nut". That was not

a part of his assignment. It was also improper and beyond his lecture assignment to state that the plaintiff had pointed a cannon at O'Hare Field the day President Johnson came to Chicago. And that the Secret Service deactivated it. The record in *Scherer* v. *Brennan and Noack* discloses that petitioner had possession of a cannon, which was kept in his garage. It was not pointed at O'Hare Field. It was not deactivated by the Secret Service.

In *Buck* v. *Colbath,* 70 U.S. 334, 346, the defendant, a United States Marshal, was held liable for the wrongful attachment in seizing property of the plaintiff. The court stated:

> "We see nothing therefore in the mere fact that the writ issued from the Federal Court, to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it."

In *Colpoys* v. *Gates,* 118 F. 2d 16, 17 (C.A.D. of C.) a complaint in libel and slander against a United States Marshal was held not subject to a motion to dismiss on the basis of official immunity. The Marshal published statements explanatory of his dismissal of certain of his deputies. The Court stated:

> "It was appellant's duty to investigate charges, if any were made, against his deputies. It may or may not have been his duty to dismiss his deputies. It was not his duty publicly to discuss their dismssal or publicly to explain the reasons for it. He had no duty to tell the public anything about them, unless possibly the bare fact that they were no longer on his staff. In the cases which have extended an absolute

> privilege to administrative officers without policy-determining functions, the thing held to be prvileged has usually if not always been an act in the general line of duty. not a separate discussion or explanation."

In the same manner in the case at bar the lecture having been made by the respondent pursuant to his assignment it was beyond the scope of that assignment when the lecture was concluded to maliciously slander petitioner.

In *McComb* v. *United States Housing Corporation,* 264 F. 589 (D.C. Del.), the court ruled that when officers of the government act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the government.

In *United States* v. *Lee,* 106 U.S. 196, 218, the assertion by the officers of the government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action. That a determination of whether their "authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question."

In *Land* v. *Dollar,* 330 U.S. 731, 738, the holding of the *United States* v. *Lee* was approved, the court stating that public officials may become tort-feasors by exceeding the limits of their authority.

Barr v. *Matteo* does not protect respondent. The slanderous statements were not part of his assigned lecture, and are not protected by the official immunity doctrine.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT MISINTERPRETS AND IS IN CONFLICT WITH BARR v. MATTEO, 360 U.S. 564. TO PREVENT FURTHER MISINTERPRETATION AND EXTENSION OF THE RULING OF BARR v. MATTEO BY THE LOWER FEDERAL COURTS, IT SHOULD BE RE-EXAMINED OR OVERRULED. THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD BE LIMITED NOT EXPANDED.

The doctrine of official immunity has been extended by the lower courts beyond the scope of the decisions of this court in announcing such doctrine. The trend in all of the States has been to limit this doctrine. The trend in the federal lower courts has been to expand this doctrine. This trend should be reversed.

In the landmark case of *Spalding* v. *Vilas,* 161 U.S. 483, this official immunity extended to a cabinet officer, and that a publication claimed to constitute an alleged libel was "not unauthorized by law nor beyond the scope of his official duties."

In *Barr* v. *Matteo,* this court relying on *Spalding* v. *Vilas* extended the official immunity doctrine to an executive officer of high rank. The lower federal courts have expanded the doctrine to cover a multitude of sins. The expansion of this doctrine is best characterized in Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 337:

> "Once spawned by the Supreme Court, the doctrine was nurtured carefully by the District of Columbia Court of Appeals. In a series of cases, stretching over forty years, the District of Columbia court has expanded the somewhat innocuous circumstances of the *Spalding* case, to cover a multitude of sins. Mali-

> cious defamation, whether of the intragovernmental, confidential report type, or of the public statement species, wrongful prosecutions of a vicious nature, conspiracies to obtain convictions on perjured evidence, and the intentional imposition of an illegal tax for the purpose of ruining the plaintiff's business, have all been sheltered by this doctrine. Of greater significance, the limitation of the *Spalding* case to 'heads of Executive departments,' a restriction which at least confined this power to a group numerically small and publicity prone, was scrapped completely, so that not only Cabinet Ministers, but also officials such as United States attorneys, FBI agents, prison wardens, parole officers, SEC commissioners, assorted bureaucrats, and just plain policemen, have been allowed to claim this privilege. Swept away by such a deluge, other federal courts, with barely a nod to state law on the way, have followed the District of Columbia lead until there is now a self-contained body of more than thirty federal court cases standing for the administrative immunity doctrine."

This article written in 1959 obviously does not cover a great number of cases which the lower federal courts have held that the official immunity doctrine applies.

The petitioner in the case at bar was denied a cause of action when he was unlawfully prevented from entering his own home. He is now publicly branded as an insane person and an attempted assassin by a federal agent acting clearly without any authority. He has again been denied relief based upon the extension by the lower courts of the doctrine announced in *Spalding* v. *Vilas* and *Barr* v. *Matteo*. These decisions do not support the rulings below. It is time that the gross abuse created by this doctrine be ended.

Respondent is not a cabinet officer, nor an executive officer of high rank. He could be granted no lawful authority to slander a private citizen, but his action in so doing

has been upheld by the lower courts. It is time that the unbridled license assumed by all federal officials of high and low rank be limited, and they be held responsible for their tortious conduct.

On December 9, 1968, this court granted Certiorari in the case of *Willingham* v. *Morgan,* No. 228. While that case involves a question of procedure, it also involves the application of the official immunity doctrine to federal officials of lower rank. Certiorari should be granted in the case at bar, and the case consolidated for hearing and argument with *Willingham* v. *Morgan.* Then the entire doctrine of official immunity may be reexamined and proper guide lines spelled out so that the doctrine of immunity is applied to proper officials only and kept within proper limitations.

CONCLUSION

Wherefore, petitioner prays for the allowance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the case entitled *Anthony J. Scherer, Plaintiff-Apepllant* v. *Kenneth Morrow, Defendant-Appellee,* No. 16661, in order that this case may be reviewed and determined by this Honorable Court.

Respectfully submitted,

ANTHONY SCHERER, JR.
Petitioner,
By JULIUS L. SHERWIN,
THEODORE R. SHERWIN
Attorneys for Petitioner

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APPENDIX A

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16661
ANTHONY J. SCHERER, JR.,
Plaintiff-Appellant,
v.
KENNETH MORROW,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 25, 1968

Before CASTLE, *Chief Judge*, MAJOR, *Senior Circuit Judge*, and SCHNACKENBERG,* *Circuit Judge*.

CASTLE, *Chief Judge*. Plaintiff brought this action in the Circuit Court of Cook County for damages resulting from alleged slanderous statements made by defendant, a United States Secret Service agent, outside the scope of his official duties. The action was removed to the District Court, which granted defendant's motion for summary judgment on the ground that there was no genuine issue of material fact as to whether defendant was acting within the scope of his official duties, thus compelling the conclusion that the statements were absolutely privileged.

Defendant's statements were made during a normal question and answer period following an assigned lecture

* While Judge Schnackenberg participated in the hearing of oral arguments and a conference of the division judges above-named, he died prior to the adoption of this opinion. He was of the view that the judgment order of the district court should be reversed.

to police cadets regarding the operations of the Secret Service in protecting the President of the United States. The alleged statements — that plaintiff was a "nut" and that the Secret Service had dismantled a cannon plaintiff had pointed at O'Hare Field the day President Johnson came to Chicago in 1964 — were made only in response to a question of one of the cadets and only for the purpose of using a pertinent local incident to demonstrate the functions of the Secret Service. The record indicates, as the District Court found, that since plaintiff possessed a "large collection of dangerous arms, including a 25 m.m. cannon," he was among those persons who might pose a danger to the President, concerning whose protection defendant was lecturing, and therefore defendant was acting within the outer perimeter of his line of duty in answering the question regarding the Secret Service's action toward plaintiff.

A federal official cannot be held personally liable for acts committed within the outer perimeter of the official's line of duty. *Barr* v. *Matteo,* 360 U.S. 564 (1959). To be within that perimeter, and therefore absolutely privileged, "[I]t is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official." *Scherer* v. *Brennan,* 379 F.2d 609, 611 (7th Cir. 1967). We hold that defendant's actions in the instant case were absolutely privileged as being within the outer perimeter of his line of duty. The judgment below is therefore affirmed.

AFFIRMED

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, September 25, 1968

Before

HON. LATHAM CASTLE, *Chief Judge*
HON. J. EARL MAJOR, *Senior Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge**

No. 16661
ANTHONY J. SCHERER, JR.,
Plaintiff-Appellant,
v.
KENNETH MORROW,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

---

* While Judge Schnackenberg participated in the hearing of oral arguments and a conference of the division judges above-named, he died prior to the adoption of this opinion. He was of the view that the judgment order of the district court should be reversed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of

The opinion filed September 25, 1968

The judgment order entered September 25, 1968

Cause No. 16661
ANTHONY J. SCHERER, JR., *Plaintiff-Appellant*
vs.
KENNETH MORROW, *Defendant-Appellee*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of November A.D. 1968.

Kenneth J. Carrick by
Clerk of the United States Court of Appeals for the Seventh Circuit.
John M. (illegible)

(SEAL)

APPENDIX D

MEMORANDUM OPINION
(Filed October 9, 1967)

Defendant's Motion for Summary Judgment

On December 10, 1965, defendant Kenneth Morrow, a Special Agent of the United States Secret Service, delivered a lecture regarding the history, jurisdiction, funtions, and activities of the Secret Service, before a class of cadet police officers of the Chicago Police Department Academy. During a question and answer period following the lecture, a question was asked by one of the cadet officers about Anthony J. Scherer, Jr., plaintiff herein. Plaintiff alleges that Morrow responded as follows:

> "That Scherer, he's a 'nut' "
>
> "We went to his house and deactivated a cannon that he had pointed at O'Hare Field the day President Johnson came to Chicago."

Relying upon the foregoing statements, plaintiff brought this action in the state courts, charging that defendant had maliciously defamed his reputation.

Defendant properly removed the suit to this court, under the provisions of 28 U.S.C. Secs. 1442 and 1446, and has now filed a motion for summary judgment, supported by affidavits. He asserts that he was acting within the scope of his official authority at the time in question, and that under the doctrine of *Barr* v. *Matteo,* 360 U.S. 564 (1959), he is absolutely privileged from any personal liability for actions committed in pursuance of his official duties.

Barr v. *Matteo,* although on a 5-4 decision, firmly pronounced that actions of government personnel acting within the "outer perimeter" of their authority, are absolutely

privileged from suit, despite allegations of malice in the complaint. The reasons for the official immunity doctrine are these (360 U.S. at 571):

> " . . . It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government . . . "

The classic statement in support of the privilege was written by Judge Learned Hand in *Gregoire* v. *Biddle,* 179 F.2d 579, 581 (2d Cir. 1949), and was quoted in *Barr* v. *Matteo:*

> " . . . The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unuinching discharge of their duties. Again and again, the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith . . . "

Barr has been followed and cited on numerous occasions, in this Circuit, and elsewhere. See e.g. *LeBurkien* v. *Notti,* 365 F.2d 143 (7th Cir. 1966); *Sauber* v. *Gliedman,* 283 F.2d 941 (7th Cir. 1960); *Chafin* v. *Pratt,* 358 F.2d 349 (5th Cir. 1966); *Kelly* v. *Dunne,* 344 F.2d 129 (1st Cir. 1965); *Chavez* v. *Kelly,* 364 F.2d 113 (10th Cir. 1966). In *Norton* v. *McShane,* 332 F.2d 855 (5th Cir. 1964), cert. denied 380 U.S. 981 (1965), it was held that the privilege attaches

where the challenged action bears some reasonable relation to or connection with the duties and responsibilities of the official.

Most recently, in *Scherer* v. *Brennan and Noack,* 66 C 846, September 22, 1966, a case related to this one, Judge Perry of this Court granted defendants' motion for summary judgment based upon the immunity theory. The Seventh Circuit affirmed on June 21, 1967 (Case No. 15,961, not yet reported), stating:

> "We hold the District Court was correct in granting defendants' motion for summary judgment. It is clear that defendants were immune from this tort suit because their actions fell within the scope of their duties to protect the person of the President of the United States. Their actions were, at least, 'within the outer perimeter' of their duties. *Barr* v. *Matteo,* 360 U.S. 564, 575, reh. den. 361 U.S. 855."
>
> * * *
>
> "It is well established that federal officials cannot be held personally liable in damages for an act committed within the general scope of their official authority and in the performance of their official duties."

The same legal principles which governed *Scherer* v. *Brennan,* should govern here. Thus the only issue for decision is whether defendant was acting within the "outer perimeter" of his duty.

His own affidavit, and that of his immediate supervisor, Maurice G. Martineau, set forth the circumstances by which defendant supports his allegation that he was acting within the general scope of his official authority. Essentially those circumstances are as follows.

Title 18, United States Code, Section 3056, defines in part, the duties of the United States Secret Service, as follows:

"Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States . . . "

Pursuant to his authority under the aforesaid statute, the Acting Secretary of the Treasury promulgated Treasury Department Order No. 173-3, on October 29, 1965, which established the office of Director of the United States Secret Service, whose duties were to include:

"(1) Create appropriate subordinate offices and assign to all offices such functions and duties as he determines to be necessary or desirable, and . . .

"All present functions and duties of the Chief, United States Secret Service, including functions under any delegation of authority to that officer made pursuant to the provisions of any Treasury Order, are transferred to the Director, United States Secret Service."

Pursuant to his authority, the Director compiled the United States Secret Service Manual, which provides in pertinent part:

"It will always be paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation. They must have as much information as necessary in order to carry out their support function. Their instructions must be explicit so that they are clearly aware of all Secret Service requirements." (Section 911.1, paragraph 4) "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)" (Section 912.2, paragraph 3)

"Each SAIC (Special Agent in Charge) is responsible for the establishment and development of effective public relations within his district. The necessity

> for establishing personal contact with other law enforcement officials . . . is self-evident." (Section 912.1, paragraph 3)
>
> "Lectures on the history of the Secret Service, jurisdictional responsibilities and activities will be made by SAIC's and SA's (Special Agents) who are qualified speakers . . . " (Section 912.2, paragraph 1)

Mr. Martineau, at that time the Assistant Special Agent in Charge of the Chicago District, states in his affidavit that pursuant to the above authority, he directed defendant Morrow to lecture before a class of cadet officers of the Chicago Police Department on the history, jurisdiction, functions and activities of the United States Secret Service. The purpose of the lecture was to:

> " . . . instruct the cadet officers so as to make them knowledgeable of all Secret Service responsibilities and to enable them to extend to the Secret Service the fullest cooperation and support in the discharge by the Secret Service of its statutory responsibilities." (Martineau affidavits, page 2)

The foregoing facts are undisputed by plaintiff in his affidavit, and must stand as admitted. It is noteworthy that plaintiff's affidavit sets forth only the facts of the statement of defendant before the cadets, in hearsay fashion, and does not challenge defendant's actions as being outside the scope of his official duties. In his brief, plaintiff makes only one feeble argument on that issue, and that with reference to Section 912.2, paragraph 3, of the Secret Service Manual, which provides:

> "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)"

He would have us believe that lectures before law enforcement groups may not include remarks on Presidential protection. Although the Section is open to two interpretations, the one chosen by plaintiff is not very impressive. Certainly the correct view must be that training lectures on Presidential protection before law enforcement groups are not limited "only" to responsibilities as prescribed by law, but in fact may go beyond that limitation. As the defendant points out, it is well known that local and state law enforcement bodies work closely, in a supporting role, with the Secret Service in protecting the president. It is logical that they should be made aware of the procedures used by the Secret Service to protect him, in much greater detail than outside groups with no need for such knowledge. Indeed, Section 911.1, paragraph 4 of the Secret Service Manual, cited above, makes it obligatory for local Secret Service Agents to provide such information to police bodies.

It would seem prudent to restrict the flow of tactical information to disinterested groups to that made a matter of public record by statutory promulgation. On the other hand, police officers should be filled in on the nature of the procedures employed to protect the President, if they are to adequately perform their role as support personnel.

Plaintiff's interpretation of paragraph 3 is without merit in this Court's opinion. Clearly defendant was acting pursuant to his official duties in lecturing a police group on methods of Presidential protection.

Plaintiff's only argument having been rejected, it, therefore, is uncontroverted that defendant was acting in the course of his official duties when he made his remarks concerning the plaintiff. It is common knowledge that extreme security precautions are observed by the Secret Service when protecting the President. Such precautions

routinely include surveillance of persons thought to pose a danger to him. As fully detailed by Judge Perry's opinion in *Scherer* v. *Brennan and Noack,* plaintiff possessed, and indeed may still possess, a large collection of dangerous arms, including a 25 m.m. cannon that could pentrate a concrete wall. It is reasonable to conclude that in connection with their support functions and otherwise, Chicago policemen would be interested in knowing the identity and whereabouts of plaintiff. We think defendant's actions made a reasonable connection to the general matters committed by law to his control or supervision, and were not "manifestly or palpably beyond his authority." *Norton* v. *McShane,* 332 F.2d 855, 859 (5th Cir. 1964).

Since it is clear that defendant was acting within the line and scope of his official duties, and that no genuine issue of material fact thereon exists, the rationale of *Barr* v. *Matteo* must govern, and an absolute privilege must attach to defendant's activities.

Plaintiff has announced his intention to file a petition for certiorari in *Scherer* v. *Brennan and Noack,* with the hope that the Supreme Court will overrule *Barr* v. *Matteo.* He asks that we defer decision on this motion until after the other case is resolved. We see no reason to delay action herein.

Defendant's motion for summary judgment is granted and the complaint must be dismissed, with costs to be assessed against plaintiff.

Enter: *A. L. Marovitz*
Abraham L. Marovitz
Judge

Dated: September 29, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 867

ANTHONY J. SCHERER, PETITIONER

v.

KENNETH MORROW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 5-11) is unreported. The opinion of the court of appeals (Pet. App. 1-2) is reported at 401 F. 2d 204.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1968. The petition for a writ of certiorari was filed on December 23, 1968. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the allegedly defamatory statements made by a Secret Service agent were privileged under *Barr* v. *Matteo*, 360 U.S. 564.

STATEMENT

Petitioner's complaint, seeking $100,000 in damages, alleged that respondent, an agent of the United States Secret Service, had made slanderous statements respecting him in an appearance before a class of cadet officers of the Chicago Police Department. On the basis of the uncontroverted affidavits of respondent and his superior, the district court concluded that the alleged statements were privileged under *Barr* v. *Matteo*, 360 U.S. 564, and granted summary judgment for respondent. The court of appeals affirmed.

The affidavits filed on respondent's behalf stated that he had been assigned by his superior to deliver a lecture to the class of cadet officers on the duties and activities of the Secret Service in order to facilitate their cooperation with and support of the Service (Pet. App. 9). The standard lecture given by respondent included comments on Presidential protection. During the question and answer period which followed the lecture, one of the cadet officers asked a question concerning petitioner, a resident of the Chicago area who had been the object of special security precautions to protect President Johnson dur-

ing a 1964 visit to Chicago.[1] According to the complaint, respondent asserted in answering the question that petitioner was a "nut" and inaccurately described petitioner's conduct and the nature of the security precautions taken during the President's visit (Pet. 3).

The district court granted summary judgment for respondent. Pointing out that petitioner's own affidavit did not "challenge [respondent's] actions as being outside the scope of his official duties," and that the uncontroverted affidavits filed on respondent's behalf established that respondent "was acting within the line and scope of his official duties", the court ruled that the alleged statements were privileged (Pet. App. 9, 11). The court of appeals affirmed, one judge dissenting.[2] It noted that respondent's alleged statements had been made in response to a question and only for the purpose of using a pertinent local incident to demonstrate the functions of the Secret Service (Pet. App. 2).

ARGUMENT

This Court, recognizing that federal officials must be free to perform their official duties without fear

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[1] Those precautions were the subject of a prior unsuccessful suit brought by petitioner against other agents of the Secret Service. *Scherer* v. *Brennan*, 266 F. Supp. 758 (N.D. Ill.), affirmed, 379 F. 2d 609 (C.A. 7), certiorari denied, 389 U.S. 1021.

[2] The majority opinion noted that Judge Schnackenberg, who had heard the oral argument but died prior to the adoption of the opinion, had been of the view that the judgment of the district court should be reversed.

that they may be subjected to tort liability, has ruled that they may not be held personally liable for acts committed within the general scope of their official authority and in pursuance of their official duties. *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593. This immunity exists if the act complained of was performed "within the outer perimeter of [the official's] line of duty * * *" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 575).[3] In this case, both courts below correctly applied these settled principles to the undisputed facts.

In performing its duty to "protect the person of the President" (18 U.S.C. 3056), the Secret Service relies heavily on the cooperation and support of local law enforcement officials and organizations. The Secret Service Manual stresses that it is "always * * * paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation" and that such organizations "must have as much information as necessary in order to carry out their support function" (Section 911.1, Pet. App. 8). The Manual specifically permits unlimited remarks on Presidential protection in training lectures before law enforcement groups (Section 912.2, Pet. App. 9).

These provisions leave no doubt that delivering a

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[3] Contrary to petitioner's apparent belief (Pet. 12-13), the application of the official immunity doctrine does not depend upon the rank of the official. *Barr* v. *Matteo*, *supra*, at 572-573. Nor, as the *Barr* case itself reflects, does an allegation that the allegedly defamatory statements were made maliciously render the doctrine inapplicable. See 360 U.S. at 568, 576.

lecture to a training class of Chicago police cadets and answering the cadets' questions was a properly authorized part of respondent's official duties.[4] Respondent's activities contributed to the development of a close working relationship with the Chicago police, and furnished the police cadets with information about Secret Service activities necessary to enable them to provide effective assistance. Furthermore, in responding to a cadet's question with reference to petitioner's conduct during the Presidential visit to Chicago, respondent discussed a recent incident illustrating the Secret Service's Presidential protection functions in a context familiar to the Chicago police cadets.[5]

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[4] Petitioner's contention (Pet. 8, 10) that it was not part of respondent's duties to engage in a question and answer session ignores that such a session is a usual concomitant of lectures to small groups, and it was the normal practice for the respondent to entertain questions following his lectures. Since the information contained in the alleged remarks was relevant to the subjects about which respondent was directed to inform the police cadets, the fact that the respondent communicated that information during the question and answer session, rather than during the lecture proper, is of no significance in determining the applicability of the privilege.

[5] Petitioner's request that this case be consolidated with *Willingham* v. *Morgan* (No. 228, this Term), certiorari granted December 9, 1968, ignores that, although the official immunity doctrine was considered by the lower courts in *Willingham*, the questions presented to this Court by the government's petition for certiorari concern only the removal to a federal court, under 28 U.S.C. 1442 (a)(1), of actions brought against federal officials in a state court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1969.

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